IN THE

Supreme Court of the United States

October Term, 1971
No. 70-117

Supreme Court, U.S.
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CHARLES JOSEPH KASTIGAR and MICHAEL GOREAN STEWART,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

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SUBJECT INDEX

Page

I.

The Policy of the Fifth Amendment Forbids Use-Immunity 1

II.

Counselman's Injunction Against Use-Immunity Is Not Dictum; and in Fact Has Become a Part of Our Constitutional Fabric 4

III.

Neither Murphy vs. Waterfront Commission, or Any Decision of This Court Since, Has Authorized or Approved Use-Immunity as Constitutionally Permissible 8

IV.

The Statute at Bar Was Enacted Without Benefit of Accurate Analysis of This Court's Opinions Relative to the Scope of the Fifth Amendment; and in Any Event, Congress May Not Repeal a Constitutional Provision 12

V.

Judicial Supervision of 18 U.S.C. Civil Section 6002 Is Impeded by the Provisions of Section 6003, and Moreover, Would Not Supply the Constitutional Deficiencies Inherent in Use-Immunity 14

Conclusion 25

TABLE OF AUTHORITIES CITED

Cases	Page
Adams v. Maryland, 347 U.S. 179 ..... 7, 13, 20, 21	
Albertson v. Subversive Activities Control Board, 382 U.S. 70 ..... 8, 10, 11, 13, 20	
Blau v. United States, 340 U.S. 332	2
Blue v. United States, 384 U.S. 252	13
Boyd v. United States, 116 U.S. 616	20
Brown v. Walker, 161 U.S. 591 ..... 2, 3, 6, 9, 19, 21,	23
Cafritz v. Koslow, 167 F.2d 749	2
Communist Party v. Subversive Activities Control Board, 351 U.S. 115	17
Counselman v. Hitchcock, 142 U.S. 585 ..... 4, 5, 6, 7, 8, 9, 10, 11, 12, 13,	20
Ellis v. United States, 416 F.2d 791	18
Emery's Case, 107 Mass. 172	5
Feldman v. United States, 322 U.S. 487 ..... 7, 9,	21
Flynn v. United States, 130 F. Supp. 412	17
Gardner v. Broderick, 392 U.S. 273 10,	13
Garrity v. New Jersey, 385 U.S. 493 ..... 1, 11,	13
Groshart v. United States, 392 F.2d 172	23
Hale v. Henkel, 201 U.S. 43	6
Heike v. United States, 227 U.S. 131	6
Hoffman v. United States, 341 U.S. 479	22
Jack v. Kansas, 199 U.S. 372 9,	21
Jencks v. United States, 353 U.S. 657	21
Katz v. United States, 389 U.S. 347	2

Page

Kinoy, Joanne In Re Grand Jury Testimony, 326 F.Supp. 407 11

Knapp v. Schweitzer, 357 U.S. 371 .....9, 18

Korman, Jack, et al., Matter of, 449 F.2d 32 .....4, 11, 19

Lawn v. United States, 355 U.S. 399 .....23, 24

Malloy v. Hogan, 378 U.S. 1 22

Mapp v. Ohio, 367 U.S. 643 2

Mesarosh v. United States, 352 U.S. 1 17

McAuliffe v. Mayor of New Bedford, 155 Mass. 216 1

McCarthy v. Arndstein, 266 U.S. 34 .....6, 7

Murphy v. Waterfront Commission, etc., 378 U.S. 52 .....8, 9, 11, 12, 16, 22

Neff, In Re, 206 F.2d 149 18

Olmstead v. United States, 227 U.S. 438 24

People v. Ditson, 57 Cal.2d 415, 20 Cal.Rptr. 165 .. 3

People v. Kelly, 24 N.Y. 74 5

Piccirillo v. New York, 400 U.S. 549 .....9, 11, 19

Reina v. United States, 364 U.S. 507 .....7, 8, 20

Rogers v. Richmond, 365 U.S. 534 .....2, 24

Shapiro v. United States, 335 U.S. 1 11

Smith v. United States, 337 U.S. 137 20

Speisser v. Randall, 357 U.S. 513 20

Spevack v. Klein, 385 U.S. 511 .....11, 13

Stevens v. Marks, 383 U.S. 234 13

Ullman v. United States, 350 U.S. 422 ..5, 7, 9, 12, 18

United States v. Coffey, 198 F.2d 438 22

United States v. Murdock, 284 U.S. 141 9

Page

United States ex rel. Catena v. Elias, 449 F.2d 40 .... 11, 19

Wayne v. United States, 318 F.2d 205 3

Miscellaneous

Los Angeles Times, Dec. 15, 1971, Part I, p. 5, Cols. 1-4 15

Los Angeles Times, Dec. 19, 1971, Sec. B, p. 2, Cols. 1-4 15

Report of the Committee on the Judiciary, U.S. Senate, 91st Cong., 1st Sess., S. Report No. 91-617, Dec. 18, 1969, p. 53 ..... 12, 13

Report of the Committee on the Judiciary, House of Representatives, 91st Cong., 2nd Sess., H.R. Report No. 91-1188, June 15, 1970, p. 11 13

Statutes

Organized Crime Control Act, Sec. 227(a) 14

Public Law 90-351, Title III, Sec. 802, June 19, 1968 14

Public Law 91-452, Title I, Sec. 102, Oct. 15, 1970 19

Public Law 91-452, Sec. 260 14

82 Statutes at Large, pp. 216-217 14

84 Statutes at Large, p. 926 19

84 Statutes at Large, p. 930 14

84 Statutes at Large p. 931 14

United States Code, Title 18, Sec. 2514 14

United States Code, Title 18, Sec. 2516 14

United States Code, Title 18, Secs. 2516-2517 14

United States Code, Title 18, Sec. 3500(e)(3) 19, 23

Page

United States Code, Title 18, Sec. 6002 14

United States Code, Title 18, Sec. 6003 .....14, 17

United States Code, Title 18, Sec. 6003(b) 17

United States Constitution Fourth Amendment 2, 24

United States Constitution, Fifth Amendment 1
2, 3, 5, 6, 7, 8, 9, 12, 14, 16, 18, 21, 22, 24, 25

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REPLY BRIEF FOR PETITIONERS.

I.

The Policy of the Fifth Amendment Forbids Use-Immunity.

The Government seeks to justify use-immunity on the theory that "the public has the right to every man's evidence" (Gov't Br. pp. 7, 11, 13).

This is one of those pithy over-statements that excites the viscera, rather than reason.[1] There is a good deal of evidence that the public is not entitled to hear—

[1] *Cf. Garrity v. New Jersey*, 385 U.S. 493, at p. 499 (1967) where a majority of this Court rejected the Holmesian dictum that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220.

even though true—because forbidden by the Constitution, public policy, statute or judicial rule.[2]

Most particularly, the public has no right to self-incriminating evidence extorted from a witness, for the Fifth Amendment expressly states that: "No person . . . shall be compelled . . . to be a witness against himself . . .". It follows that a witness is under "no duty to disclose" information or "aid in the enforcement of the law" against himself (Gov't. Br. p. 13).

The Government's Brief concedes (pp. 13, 20) that immunity is not co-extensive with the Fifth Amendment Privilege where testimony compelled thereunder may aid Government directly or indirectly. (*Brown v. Walker*, 161 U.S. 591, 597 (1896)). This is because the right to remain silent, guaranteed by the Fifth Amendment, assures a witness that his testimony will not aid Government in securing a conviction against him. Transactional immunity serves substantially the same end, for as long as a witness is immunized from prosecution for any offense which is the subject of his testimony, he is receiving essentially the same protection afforded him by the Privilege.

Use-immunity, however, can offer no such protection. On the contrary, whenever a person is compelled to im-

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[2]See: *Mapp v. Ohio*, 367 U.S. 643 (1961) holding that the Fourth Amendment requires exclusion of illegally seized evidence; *Katz v. United States*, 389 U.S. 347, 359 (1967) Exclusion of illegal eavesdropping evidence held required by Fourth Amendment; *Rogers v. Richmond*, 365 U.S. 534, 543-544 (1961) requiring suppression of a coerced confession irrespective of its probable truth or falsity; *Blau v. United States*, 340 U.S. 332 (1951), communication between husband and wife deemed privileged; *Cafritz v. Koslow*, 167 F.2d 749, 751 (C.A.D.C., 1948) ". . . the [client-attorney] privilege is an *exception* to the general liability of every person to give testimony upon all facts inquired of in a court of justice." (Emphasis supplied).

plicate himself in a crime for which he remains prosecutable, he is furnishing evidence which can aid Government in obtaining his conviction, whether or not such evidence, or its fruits, are actually used at trial. For example, the prosecution can cross-examine a witness at trial based on information gained from him in the Grand Jury room. Critical information obtained from a use-immunized witness may furnish leads to witnesses or to evidence whose source is impossible to prove, or though proven, is deemed admissible on the theory that it would have been obtained eventually by independent means (See: *People v. Ditson*, 57 Cal.2d 415, 20 Cal.Rptr. 165 (1962) (cert. denied); *cf.: Wayne v. United States*, 318 F.2d 205, 209 (C.A. 4th, 1963)). Or, tainted evidence may be imparted by investigators to a key witness in such a way as to emerge at trial as independently acquired.

The policy of the Privilege is not limited to exclusion of tainted evidence from trial, but bars *any* use of it which foreseeably would benefit the prosecution, though beyond the reach of a motion to suppress (See: *Brown v. Walker*, 161 U.S. 591, at pp. 595, 597 (1896)).[2a]

As the Government's Brief concedes (p. 14), the witness must be placed "in the same position with respect to a criminal prosecution after his testimony, as he was before". It is evident that under the use-immunity statute at bar, he cannot be. Therefore, the statute offends the Fifth Amendment because its protection is inadequate.

[2a]". . . If an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the question is put to him may assume an inquisitorial

(This footnote is continued on next page)

II.

Counselman's Injunction Against Use-Immunity Is Not Dictum; and in Fact Has Become a Part of Our Constitutional Fabric.

In *Counselman v. Hitchcock*, 142 U.S. at p. 585-586, this Court unanimously held that—

> "No statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him can have the effect of supplanting the Privilege conferred by the Constitution of the United States. [Use-] immunity does not supply a complete protection from *all* the perils against which the Constitutional prohibition was designed to guard, and is not a full substitute for that provision. In view of the Constitutional provision, a statutory enactment to be valid must afford absolute immunity against future prosecution for the offense to which it relates." (Emphasis supplied).

The Government argues that this language is mere dictum which furnishes only "illusory support" for the rule it announces, and need not be followed by this Court (Gov't. Br. p. 14).

As the Seventh Circuit observes in *Matter of Jack Korman, et al.*, 449 F.2d 32, at p. 37:

> "It is illogical, in light of the decision cited, to argue that the [Supreme] Court has never 'held' that transactional immunity is the minimal requirement and that the assertions to that effect are mere dicta."

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character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the early state trials . . . made the system so odious as to give rise to a demand for its total abolition."

The fact is that the central issue presented, argued and decided in *Counselman* was whether use-immunity as such satisfied the demands of the Fifth Amendment. The Government contended in *Counselman* (142 U.S. at p. 557), as it does here, that the Fifth Amendment guarantees only that a witness's testimony would not be used against him. In support of its position, the Government cited *People v. Kelly,* 24 N.Y. 74, and like cases, upholding State use-immunity statutes which, unlike that in *Counselman,* prohibited even derivative use. The Government sought to distinguish *Emery's Case,* 107 Mass. 172, and others which held use-immunity inadequate under State Constitutions which the Government contended contained different phraseology than the Fifth Amendment.

After a careful analysis of *People v. Kelly,* and the line of cases following that rationale, this Court *unanimously* rejected the view that the Fifth Amendment protected only against the use of compelled testimony, stating:

> "In view of the Constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which it relates. In this respect, we give our assent rather to the doctrine of *Emery's Case,* in Massachusetts, than to that of *People v. Kelly,* in New York; and we consider the ruling of this Court in *Boyd v. United States, supra,* supports the view we take." (142 U.S. at p. 586).

As Mr. Justice Frankfurter was later to summarize for a majority of the Court in *Ullman v. United States,* 350 U.S. 422, at pp. 436-437:

> "Four years previously, in *Counselman v. Hitchcock,* 142 U.S. 547, a unanimous court had

found constitutionally inadequate the predecessor to the 1893 statute because the immunity granted was incomplete in that it merely forbade the use of the testimony given and *failed to protect a witness from further prosecution based on knowledge and sources of information obtained from the compelled testimony*."

While only transactional immunity was presented in *Brown v. Walker,* 161 U.S. 591, the majority opinion in no way departed from the view expressed in *Counselman* that the Fifth Amendment required absolute immunity from prosecution. Indeed, the *Brown* majority, rejecting the contention of the four dissenting justices that no immunity could constitutionally displace the Privilege, chose to read that provision as satisfied by—

> "secur[ing] the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure." (161 U.S. at p. 595).

Thus, thought the *Brown* majority, if a statute permitted a witness's testimony to—

> ". . . operate as a complete pardon for the offense to which it relates—a statute absolutely securing to him *such* immunity *from prosecution* would satisfy the demands of the clause in question." (161 U.S. at p. 595) (Emphasis supplied).

The *Counselman* doctrine that nothing less than immunity from prosecution could effectively supplant the Fifth Amendment Privilege became thereafter and has remained a viable principle of constitutional law.[3] So

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[3]*Hale v. Henkel,* 201 U.S. 43, 67 (1906); *Heike v. United States,* 227 U.S. 131, 142 (1913); *McCarthy v. Arndstein,* 266

much so, that Mr. Justice Frankfurter was prompted to observe that the transactional immunity conferred by—

> "the 1893 statute has become part of our constitutional fabric . . ." (*Ullman v. United States, supra,* 350 U.S. at p. 438).

The Government Brief contends (p. 21) that Justice Frankfurter did not mean what he said because "shortly after that language he intimated that an immunity statute would be valid if it gave 'complete amnesty' or prohibited the use of 'compelled testimony' ". This assertion is palpably incorrect as the context reveals. Justice Frankfurter was simply noting the existence of such immunity statutes at a time when the Fifth Amendment had not yet been deemed applicable to the States.[4]

In no way did Justice Frankfurter express or imply that use-immunity was co-extensive with the Fifth. On the contrary, in his dissent in *United States v. Monia,* 317 U.S. at p. 438, he noted that—

> "For more than seventeen years thereafter it was unquestioned that Congress had given no more than the Constitution *required*—freedom from prosecution for evidence that could not otherwise be obtained . . .".

In any event, the Government's insistence that *Counselman's* prohibition against use-immunity is mere

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U.S. 34, 42 (1924); *United States v. Monia,* 317 U.S. 424, 428 (1943); *Reina v. United States,* 364 U.S. 507, 514 (1960) (holding that testimony compelled under a Federal transaction immunity statute safeguarded the witness from either Federal or State prosecution. See also: *Adams v. Maryland,* 347 U.S. 179, 182 (1954).

[4]See: *Feldman v. United States,* 322 U.S. 487 (1944).

dicta cannot stand exposure to *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, which the Government's Brief (p. 25) inexplicably brushes aside as inapposite.

In *Albertson*, the Court, noting the afore-quoted language of *Counselman* (142 U.S. at pp. 585-586), unanimously[5] found that when "*measured by these standards*", the use-immunity granted by the statute at bar was "not complete". (382 U.S. at p. 80) (emphasis added).[6]

The significance of *Albertson* is not only that it reaffirmed *Counselman* in the context of a use-immunity statute, but that it did so one year *after* this Court's decision in *Murphy v. Waterfront Commission, etc.*, 378 U.S. 52 (1964), which the Government—and Congress—assume reversed Counselman *sub silencio*.

That view is not justified in light of *Albertson*; nor, as we shall now see, is it warranted by *Murphy*, either.

III.

Neither Murphy vs. Waterfront Commission, nor Any Decision of This Court Since, Has Authorized or Approved Use-Immunity as Constitutionally Permissible.

The Government's analysis of decisions of this court lead it to conclude that *Murphy* and post-*Murphy* opinions have viewed the Fifth Amendment Privilege as barring only the use of incriminating testimony

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[5]Mr. Justice White did not participate; but Mr. Justice Stewart, who concurred with Mr. Justice White's Opinion in *Murphy*, did.

[6]See also: *Reina v. United States*, 364 U.S. 507, holding a transactional immunity statute barred prosecution in either a State or Federal court, based on testimony given thereunder.

(Gov't Br. pp. 24-26). Support for this contention leans heavily, if not exclusively, upon the concurring opinion of Mr. Justice White, whose learned views on the subject were carefully avoided by the majority,[7] and therefore cannot be read as an extension of the prevailing opinion of that court.

For one thing, the statute before the court in *Murphy* conferred *transactional*, not use, immunity. Therefore, it was unnecessary for the *Murphy* court to consider whether use-immunity was co-extensive with the Fifth Amendment Privilege, and it did not attempt to do so.

More importantly, the *Murphy* majority, far from undermining *Counselman*, expanded the scope of the Privilege by extending its reach to the States. This it did by overturning a doctrine which, since *Brown v. Walker*, 161 U.S. at p. 606, had been deposited on the misconception that English case law held that immunity granted by one jurisdiction was not binding upon another.[8] But the court, acutely sensitive to the delicacy of Federal-State relations, steered the new rule along a constitutional course which permitted each jurisdiction to utilize immunity as it deemed appro-

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[7]It must surely come as a surprise to Messrs. Justices Douglas and Brennan that the majority opinion in which they joined in *Murphy* is now to be construed as upholding use-immunity, in view of Mr. Justice Douglas' dissent with the late Justice Black, in *Ullman v. United States, supra,* 350 U.S. at pp. 507 *et seq.*, and with the dissent of both Justices in *Piccirillo v. New York,* 400 U.S. at pp. 549, 552; and in further light of *Albertson, supra,* which was written, of course, by Mr. Justice Brennan and joined in by Mr. Justice Douglas.

[8]*Jack v. Kansas,* 199 U.S. 372 (1905); *United States v. Murdock,* 284 U.S. 141, 149 (1961). *Cf. Feldman v. United States, supra,* 322 U.S. 487 and *Knapp v. Schweitzer,* 357 U.S. 371 (1958), which reached the same conclusion via a different theory.

priate to the enforcement of its laws, while avoiding a rationale which would allow so-called "immunity baths" to be conferred by the first jurisdiction to grant a witness immunity. For the latter alternative would surely have been the consequence of a ruling which permitted transactional immunity conferred by one jurisdiction to bar prosecution for the subject offense in the other.

It was with these pragmatic considerations in mind that Mr. Justice Goldberg, writing for the majority, held—

> ". . . the constitutional rule to be that a State witness may not be compelled to give testimony which may be incriminating under Federal law unless the compelled testimony and its fruits cannot be used in any manner by Federal officials in connection with a criminal prosecution against him." (378 U.S. at p. 79).

If the majority had believed that use-immunity, as such, could constitutionally "accommodate the interests of the State and Federal Governments in investigating and prosecuting crime", they would surely have said so. That they did not suggest that the majority adhered to the holding of *Counselman*, a view which is consistent with, and expository of *Albertson*, decided a year later.

The Government likewise sees implicit approval of use-immunity in *Gardner v. Broderick*, 392 U.S. 273, 276 (Gov't Br., p. 26). But it is apparent from the opinion that the language cited in the Government's

Brief is simply descriptive of the holdings in *Counselman* and *Murphy*, and in no way is intended to endorse use-immunity. Indeed, the citation of *Counselman* by the court was to that passage which held use-immunity constitutionally inadequate.

In *Spevack v. Klein*, 385 U.S. 511, 519-520, Mr. Justice Fortas concurred with the majority that, as in *Garrity v. New Jersey, supra*, 385 U.S. 493, testimony of a public employee or State licensee compelled under threat of disciplinary sanctions cannot be used in a subsequent criminal proceeding. His opinion is concerned essentially with the soundness and applicability of the public records doctrine first enunciated in *Shapiro v. United States*, 335 U.S. 1, (1948). Nowhere does his concurring opinion mention, let alone endorse, use-immunity. In this respect, it is not insignificant that Mr. Justice White joined with the majority in both *Spevack* and *Garrity*.

Equally inapplicable are the other authorities cited by the Government's Brief (p. 26) as allegedly demonstrative of judicial approval of use-immunity. Accordingly, the holdings of *Counselman* and *Albertson* declaring use-immunity constitutionally insufficient remains as viable precedent (See: *In the Matter of Jack Korman, et al., etc., supra*, 449 F.2d 32 (Cert. pending); *United States ex rel. Catena v. Elias*, 449 F.2d 40 (C.A. 3 (1971); *In Re Grand Jury Testimony of Joanne Kinoy*, 326 F.Supp. 407 (D.C.S.D.N.Y., 1971); See also: *Piccirillo v. New York*, 400 U.S. 548. (1971) (Dissenting Opinion)).

IV.

The Statute at Bar Was Enacted Without Benefit of Accurate Analysis of This Court's Opinions Relative to the Scope of the Fifth Amendment; and in Any Event, Congress May Not Repeal a Constitutional Provision.

The Government's Brief, pp. 26-27, suggest that Congressional enactment embodied in the statute at bar is entitled to "great weight". So it is, where Congress is constitutionally empowered to act.

The Congress is without power to amend the Constitution by statute, no matter how laudable its objective or reflective its judgment (*Counselman v. Hitchcock, supra*, 142 U.S. at p. 565).

> "Nothing new can be put into the Constitution except through amendatory processes. Nothing old can be taken out without the same processes." *Ullman v. United States, supra,* 350 U.S. at p. 428.

The United States contends that the statute at bar is bottomed on Congressional judgment that transactional immunity "was no longer—if it had ever been—a constitutional requirement" (Gov't. Br. p. 26); that it reflects a "Congressional judgment that complete transactional immunity exceeds the requirements of the Fifth Amendment" (Gov't. Br. p. 31).

Regrettably, Congressional judgment seems to rest upon substantially the same analysis of *Murphy* as that advanced by the Government in its Reply Brief. The Reports of the Judiciary Committees of the House and Senate,[9] which appear to be similar, if not identical, assert—

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[9]Compare: Report of the Committee on the Judiciary, U.S. Senate, 91st Cong., 1st Sess., S. Report No. 91-617, Dec. 18,

"The Court found [in *Murphy*] that the Constitutional Privilege was adequately displaced if the witness was protected against direct or derivative use of his compelled testimony. Contrary to the Counselman decision, the court seemed to think that this was possible through the use of the 'fruit of the poisonous tree' process of derivative suppression . . .

"*If* the underlying premise of *Counselman* that there is no way to protect the witness from the derivative use of his compelled testimony has been rejected, it seems that granting immunity from prosecution rather than use of testimony is no longer constitutionally compelled on any level, State or Federal. It is not necessary to give transaction immunity against State prosecution to give a valid grant of Federal immunity."[10] (Emphasis added.)

It is apparent from petitioner's discussion of *Murphy* that the Committees' Reports misapprehend that Decision, an impression which gains momentum from the fact that neither Committee Report mentions *Albertson* at all, nor *Adams v. Maryland,* 347 U.S. 179, 182 (1954), holding the Congressional use-immunity statute there in question "does not provide 'complete' immunity 'as required by Counselman' ".

1969, at p. 53, and Report of the Committee on the Judiciary, House of Representatives, 91st Cong., 2nd Sess., H.R. Report No. 91-1188, June 15, 1970, at p. 11.

[10]The Reports (i.d.) cite for support of this thesis: *Garrity v. New Jersey, supra,* 385 U.S. 493; *Spevack v. New York, supra,* 385 U.S. 511, *Gardner v. Broderick, supra,* 392 U.S. 273; *Stevens v. Marks,* 383 U.S. 234 (1966), in which this Court expressly declined to consider whether use-immunity afforded the absolute protection required by *Counselman* and *Albertson* (383 U.S. at pp. 244-245); and *Blue v. United States,* 384 U.S. 252 (1966), in which a unanimous court again expressly failed to pass on the constitutionality of use-immunity.

In enacting the statute at bar, Congress thus appears to have been denied a complete and accurate appraisal by its judiciary committees of prevailing Fifth Amendment standards governing use-immunity. The value of Congressional judgment, therefore, is substantially weakened by its dependence upon an incorrect analysis by the statute's authors.[11]

V.

Judicial Supervision of 18 U.S.C. Civil Section 6002 Is Impeded by the Provisions of Section 6003, and Moreover, Would Not Supply the Constitutional Deficiencies Inherent in Use-Immunity.

The Government defends §6002 by arguing that, for practical reasons, there will be no prosecutions of use-immunized witnesses "in the great majority" of cases, citing as evidence the self-serving testimony and guide lines of Justice Department officials (Gov't. Br. pp. 32, 34).

The promise of non-abuse of extraordinary power is of little comfort to its victims, nor a deterrent to a despot. Already we are told that similar assurances given in support of the wire-tap statute enacted in 1968[12]

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[11]Significantly, Congress, perhaps skeptical of its Committees' analysis, hedged on complete acceptance of use-immunity, for Section 227(a) of the Organized Crime Control Act, P.L. 91-452, Section 260; 84 Stat. 930, 931, Oct. 15, 1970, postponed the repeal of transactional immunity conferred by 18 U.S.C. §2514 until 1974. Consequently, transactional immunity "before any Grand Jury or court of the United States" remains available for numerous offenses described by 18 U.S.C. §2514 and by reference, §2516, including espionage, sabotage, murder, kidnapping, bribery, racketeering, extortion and other serious crimes.

[12]Pub. L. 90-351, title III, §802. June 19, 1968, 82 Stat. 216-217, 18 U.S.C. §§2516-2517.

have been transgressed by misuse and lawless evasion.[13]

How many immunized witnesses will remain exposed to prosecution under the Government's "savings clause" is entrusted to the exclusive discretion of future Attorneys-General, and their subordinates, whose deviations from this commitment will be made, if at all, long after the promise is forgotten.

But, even if it is true that the Government intends to prosecute such witnesses in relatively few cases, surely the accommodation of so rare and ignoble an exception affords no compelling justification for this Court to overturn 80 years of judicial precedent, and now hold that a witness may be prosecuted for an offense after he has been forced, on pain of imprisonment, to incriminate himself with respect thereto.

The purpose of use-immunity, it is argued (Gov't. Br. p. 31) is to prevent "immunity baths" resulting from mistake or corruption. "Immunity baths" occur, however, not because of the Privilege, but out of legis-

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[13]See: *Los Angeles Times,* December 19, 1971, Section B, p. 2, Cols. 1-4, quoting the Chairman of the Senate Sub-Committee on Administrative Practice and Procedure as informing his Committee that: "The number of Federal wire-tapping and bugging devices installed without court authorization is substantially greater than the Executive Branch has led the public to believe." On the basis of official information, the Chairman is said to have concluded that "warrantless national security taps were left running much longer than court authorized devices in criminal cases"; and that " 'warrantless devices [in 1969 and 1970] accounted for an average of 78 to 209 days of listening per device, as compared with a 13-day per device average' for court ordered taps."

See also: *Los Angeles Times,* December 15, 1971, Part I, p. 5, Cols. 1-4, quoting extensively from a recent Report of the American Civil Liberties Union on the pervasiveness of wire-tap and electronic surveillance, and alleged official concealment thereof through publication of purportedly misleading data.

lative efforts to repeal it. Immunity is not just permitted by the statute; it is imposed. Therefore, the defects of immunity should be cured by reforming immunity, not by destroying or undermining the Privilege.

One form of "immunity bath" would be obviated by repeal of statutes granting immunity automatically and requiring the Privilege to be claimed as a condition for receiving immunity (See: *United States v. Monia*, 317 U.S. 424 (1943)). This would permit the conferring jurisdiction to decide whether, in balance, the information sought justified a grant of immunity in lieu of prosecution.

On the other hand, immunity baths, so-called, are obviated by *Murphy*, even though transactional immunity is retained as the standard. It is therefore apparent that "immunity baths" can be avoided by logical application of existing principles, as was done in *Murphy*, without displacing the Fifth Amendment Privilege itself.

"A practical reason for refraining from prosecution of" a witness asserted by the Government's Brief (p. 34), is to assure "the continued and unimpeded flow of information concerning criminal activities."[14]

But this objective is not diminished by prosecution, for the immunized witness has no alternative; he faces jail for criminal contempt if he refuses to provide in-

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[14]Earlier, the Government described the statute as an effort to ensure the flow of information "without granting a reward to those who would use the Fifth Amendment as a sword rather than a shield" (Gov't. Br. p. 9). On the other hand, the Act tears away the shield by compelling disclosure, thereby furnishing the Prosecutor with information which he may use as a sword against the witness at the latter's trial.

formation, and he risks prosecution and imprisonment if he does.

What the fear of prosecution does insure, however, as Petitioners noted in their Opening Brief, p. 32, is that the witness is more likely to say what he thinks the Government wants to hear, for fear that anything less may subject him to prosecution. Such has been the American experience under less compelling stress. (See: *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115 (1956); *Mesarosh v. United States*, 352 U.S. 1 (1956); *Flynn v. United States*, 130 F.Supp. 412 (S.D.N.Y., 1955)).

The truth is that the Government's professed policy of prosecuting use-immunized witnesses only in exceptional cases is illusory, not only because the mere threat of prosecution, coupled with the alternative threat of jail for non-cooperation, serves whatever ends the Attorney General or his subordinates deem appropriate; but also because in the so-called exceptional case, 18 U.S.C. §6003 deprives the District Court of the power to surveill those ends, or indeed, the inquisitorial methods employed in the Grand Jury room to achieve them.[15]

The Government's Brief states, p. 34, that there are "some circumstances" in which prosecution of a use-

[15]Under §6003(b), Title 18 U.S.C., an immunity Order may be sought by the United States Attorney, subject to the approval of the Attorney General or his subordinates; but, as noted in Petitioners' Brief, p. 35, the District Court is required to issue the Order upon the mere representation that 1) the witness' testimony is necessary to the public interest and 2) such individual has refused to testify or is likely to (see: App'x. pp. 54-61, 38-42). The legislative history of this provision, as disclosed by the Report of the House Judiciary Committee (see: Petitioners' Opening Brief, p. 36) evidences a congressional intent to vest exclusive control over the administration and exercise of use-immunity in the Justice Department.

immunized witness is justified. One example offered is a witness who testifies before the Grand Jury and invokes his Privilege at trial. But this is simply a waiver problem which is soluble by judicial determination irrespective of immunity. It is obvious from a reading of *In Re Neff*, 206 F.2d 149 (C.A. 3, 1953) and *Ellis v. United States*, 416 F.2d 791 (C.A. D.C., 1969) that transactional immunity had nothing whatever to do with the dichotomous results reached by those cases.

The statute at bar seems rooted in the notion that the guilty—or at least those who under the compulsion of use-immunity reveal their complicity in serious crimes—should not go free. Such, at least, is the type of exceptional case which the Government's Brief would reserve for prosecution (pp. 35, 36).

Yet, it appears inconsonant with logic or ordered liberty that the availability of so "deeply valuable"[16] a right as the Fifth Amendment Privilege against self-incrimination should be made dependent upon the discretion of a witness's prosecutor.

> "No doubt the Constitutional Privilege may, on occasion, save a guilty man from his just desert [sic]. [The Privilege] was aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had too much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against future abuses by law enforcement agencies." *Ullman v. United States, supra*, 350 U.S. at p. 427.

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[16]Harlan, *J.*, concurring, *Knapp v. Schweitzer, supra*, 357 U.S. at p. 380.

The dangers of abuse inherent from use-immunity, and from the inefficiency of the tainted evidence rules necessary for its enforcement, have been detailed in Petitioners' Opening Brief, pp. 34-42; and elsewhere.[17] But the Government urges that the " 'uncertainties' of the fact-finding process are not a reason for rejecting use-immunity" because the burden of proof rests upon the prosecution (Gov't Br. pp. 36-37). The Government's answer is unconvincing because, as shown in Petitioners' Opening Brief, pp. 37-42, its burden is illusory. The Government seeks to soften this by suggesting that the witness will be protected by counsel (Gov't Br. pp. 37, 38). This contention is specious.

As the Government well knows, the accused is not permitted counsel before the Grand Jury, where the real damage to his client's interests occurs. Nor is counsel in any better position than his client to perceive what evidence is independently acquired. Indeed, Congress has made that even more difficult by amending the *Jencks Act* to preclude discovery of Grand Jury testimony until time of trial.[18]

It is not entirely accurate to assert, as the Government's Brief does at p. 37, that "the mere possibility of error in the fact-finding process has never been accepted by this court as a sufficient basis to require tota' immunity from prosecution." (See: *Brown v. Walker, supra,* 161 U.S. at p. 597). It was surely implicit in

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[17] See: *In the Matter of Jack Korman et al., supra,* 449 F.2d at pp. 34-35, n. 5; the concurring Opinion of Chief Judge Seitz in *U.S. ex rel. Catena v. Elias, supra,* 449 F.2d at p. 45; and the Opinion of Mr. Justice Brennan, dissenting in *Piccirillo v. New York,* 400 F.2d 548 at p. 552; and in the *Amicus* Brief of the Center for Constitutional Rights, pp. 25-31.

[18] 18 U.S.C. §3500(e)(3); Pub. L. 91-452, Title I, §102, Oct. 15, 1970, 84 Stat. 926.

Counselman v. Hitchcock, 142 U.S. at pp. 581-582 (quoting *Boyd v. United States,* 116 U.S. 616, 633) and in *Albertson v. Subversive Activities Control Board, supra,* 382 U.S. at p. 80, that the possibility of error in the fact-finding process, however remote, was one reason why use-immunity could never satisfy the Privilege. There is no fact-finding process when the Privilege is invoked, as there is none under transactional immunity. In the latter instance, the sole question is one of law, namely, whether the witness testified concerning the subject for which he is subsequently prosecuted. (See: *Adams v. Maryland, supra,* 347 U.S. 179; *Reina v. United States, supra,* 364 U.S. 507; *Smith v. United States,* 337 U.S. 137 (1949)).

And this question may generally be resolved simply by reviewing the Grand Jury minutes or transcript.

But with the Government in exclusive control of all the information relevant to the fact-finding process, and with the discovery thereof severely limited by statute and court rule, a use-immunized defendant is denied effective means of disproving the Government's claim that evidence was independently acquired.

Moreover, the issue of whether evidence has been independently acquired will frequently turn on the Trial Court's determination of the credibility of witnesses, the outcome of which is predictable if the accused is without means or evidence to dispute the claim, or pits the testimony of the accused and his witnesses against that of law enforcement officers or other more "respectable" sources.[19]

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[19]"There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account." *Speisser v. Randall,* 357 U.S. 513, 529 (1958).

In any event, the Government's knowledge of a use-immunized witness's defense is itself an important and useful aid in obtaining his conviction, (Compare: *Jencks v. United States,* 353 U.S. 657, 667 (1957); see: *Brown v. Walker, supra,* n. 22, *supra*), and, without more, demonstrates the incompleteness of use-immunity protection.

The Government does not seriously deny these and other dangers cited by petitioners and others;[20] but contends they are remote and speculative possibilities which are beyond the purview of the Fifth Amendment.

It is easy to dispose of a difficult claim by labeling it as remote or speculative; but the label begs the question and demeans the constitutional right involved. Moreover, such a retort sometimes proves wrong.

In *Brown v. Walker, supra,* 161 U.S. at p. 591, the majority, in upholding the constitutionality of transactional immunity, dismissed the argument that federally compelled testimony thereunder would be used by State prosecutors as "so improbable that no reasonable man would suffer it to influence his conduct" (p. 606). But this "improbability" became a reality in *Adams v. Maryland, supra,* 347 U.S. 179.

Again, in *Jack v. Kansas, supra,* 199 U.S. 372, at p. 380, the court, rejecting an attack made on the immunity statute there at bar, expressed doubt that a prosecution for the same act "would be instituted" for violation of a State and Federal law. But this court refused to follow those "cautionary words" in *Feldman v. United States,* 322 U.S. 487, 493-494, involving precisely such a bi-jurisdictional prosecution.

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[20]See n. 17, *supra.*

Moreover, the lack of adequate standards in the remoteness argument as used by the Government's Brief —and in Mr. Justice White's concurring opinion in *Murphy, supra,* pp. 102-103—renders it an inappropriate response to a constitutional claim rooted in the Privilege.

The Fifth may be invoked by a witness who perceives that an answer may incriminate him. The court, of course, is the final arbiter of whether the witness's apprehension is justified. But, as stated in *United States v. Coffey,* 198 F.2d 438, at pp. 440-441 (C.A. 3, 1952):[21]

> "[I]n determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection, incrimination may be approached by obscure and unlikely lines of inquiry."

The appropriate standard, said this court in *Hoffman v. United States,* 341 U.S. 479, at p. 489, quoted with approval in *Malloy v. Hogan,* 378 U.S. 1, 11-12 (1964) is whether it appears:

> ". . . '*perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate". (Emphasis supplied).

The court stressed in *Hoffman* and *Malloy, supra,* that—

> "To sustain the Privilege, it need only be evident from the implications of the question, and the

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[21]Cited with approval in *Malloy v. Hogan,* 378 U.S. 1, 13, N. 9 (1964).

setting in which it is asked, that a responsive answer to the question, or an explanation of why it cannot be answered *might* be dangerous because injurious disclosures could result." (Emphasis supplied).

Guided by these standards, it is "perfectly clear" that answers given by a use-immunized witness might possibly—or even are resonably likely to—aid the Government in securing his conviction.

The fact is that some of the dangers dismissed by the Government as remote or speculative have in fact materialized into reality. The possibility, for example, that a prosecutor might use the Grand Jury room to gain information from a use-immunized witness for impeachment purposes was recalled from history in *Brown v. Walker, supra,* 161 U.S. 597 [see n. 2a, *supra*]; (compare: *Groshart v. United States,* 392 F. 2d 172, 180 (C.A. 9, 1968)).

The procedural obstacles encountered by a use-immunized witness seeking to disprove that evidence is tainted is insured by the *Jencks Act,* Title 18 U.S.C. §3500(e)(3), and illustrated by *Lawn v. United States,* 355 U.S. 399 (1958), which upheld convictions based on tainted Grand Jury evidence, which the Government, despite unequivocal assurances to the contrary, "inadvertently used". The Court there affirmed denials by the District Court of motions to inspect the Grand Jury transcript (Petitioner's testimony was not furnished until the trial was well in progress), and a defense request was for a hearing to determine whether the prosecution evidence was independently acquired.

The likelihood that the qualifications and exceptions imposed on exclusionary rules applied in other constitutional areas will result in convictions based on evidence

forced from the mouth of a use-immunized witness is also exemplified by *Lawn v. United States, supra,* and by several cases discussed in Petitioners' Opening Brief, pp. 39-42.

The Government's Brief concludes its defense of use-immunity by proposing that it can be administered by the same fact-finding process applied to searches and seizures and coerced confessions (Gov't. Br. pp. 38, 39).

The point is not apt because the interests and issues involved at bar are not the same as those raised in search and seizure and coerced confession cases.

The Fourth Amendment prohibits only unreasonable searches and seizures. When the question of an illegal search reaches the court, the right has long since been transgressed, if at all. The exclusionary rule, then, is a rule of deterrence; it suppresses only the fruits of *unreasonable* searches, and this, out of deference to the court's "regard for its own dignity as an agency of justice and custodian of liberty . . ." (Holmes, *J.* dissenting in *Olmstead v. United States,* 227 U.S. 438, 470 (1928)).

Similarly, the Fifth Amendment does not proscribe police interrogations, or admissions adduced therefrom. What it forbids are *forced* confessions. The exclusionary rule, while recognizing that a compelled confession may be untrue, is essentially also a rule of deterrence (*Rogers v. Richmond, supra,* 365 U.S. at pp. 543-544).

As has been shown, the exclusionary rules are imperfect; but the right having been already lost, such imperfections are deemed to be tolerable in view of the ultimate purpose they serve, namely, to encourage compliance with constitutional standards.

In no way, however, do the exclusionary rules encourage forced confessions or unreasonable searches and seizures. Their function is simply the pragmatic one of coping with constitutional rights that have been abridged collateral to the crime committed.

But here, the Court is considering whether a statute is co-extensive with the Fifth Amendment Privilege where it authorizes forced confessions which by virtue of imperfect rules and methods designed for deterrence, *might* lead to convictions based thereon.

It seems clear that the Privilege against self-incrimination would be irreparably and substantially diminished if its scope were to be entrusted to the imperfections of a fact-finding process.

Conclusion.

For the foregoing reasons, as well as those mentioned in Petitioners' Opening Brief, and in the briefs of Amicus Curiae filed herein, it is respectfully submitted that the judgments of the courts below should be reversed, and the statute at bar held unconstitutional as violative of the Fifth Amendment Privilege.

Respectfully submitted,

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